STANDARDS FOR JUDGING REASONABLENESS OF LAWS GOVERNING BUSINESS REGULATION IN THE GERMAN FEDERAL REPUBLIC

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I

Even in states with an economic situation based on liberal principles as in the United States of America, Switzerland or in the German Federal Republic the enactment of laws regulating economic activities has been inevitable for a long time for various reasons. For the United States, K. Loewenstein[1] declares that today, in the middle of the twentieth century the economic conditions in the states are, practically speaking, entirely under the regulation of the State. For Switzerland, the problem of the relations between the State and business, as E. Ruck[2] says, has found a solution appreciating in principle freedom of economic life but admitting exceptions and limitations in the interest of the public welfare and thus giving a compromise between the demands of the general interest and private interests. Of great importance is the purpose of reaching a satisfying solution of the social problem (*Soziales Problem*) and of thus realizing a social state (*Sozialstaat*). These approaches create very difficult problems with reference to the combination of a state under the rule of law (Rechtsstaat) and a social state, because the liberal state under the rule of law allows only the fewest possible infringements on the sphere of freedom and property, while the social state on the other hand inevitably brings such infringements on freedom and property.

These problems are especially important in the Federal Republic of Germany as its Constitution, the Basic Law of May 23, 1949, denominates the Federal Republic as a democratic and social federal state (art. 20) and speaks of the principles of the republican, democratic and social state based on the rule of law (*Rechtsstaat,* art. 28, par. 2).

The Constitution of the United States does not contain *expressis verbis* the concepts of a state based on the rule of law and of a social state, but even there the legislative power and the judicial control of the legislation find themselves often faced with the problem of solving a similar question: it is the dilemma of how far the regulations of economic conditions by the state may go without giving up the principles of a free economic system.

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1 Verfassungsrecht und Verfassungspraxis der Vereinigten Staaten 233 (1959).

2 Schweizerisches Staatsrecht 16, 105 (3d ed. 1957).

The following observations will try to demonstrate a few general directions or guiding principles for the solution of the aforesaid dilemma. The examples will especially be taken from the jurisdiction of the German Federal Constitutional Court (*Bundesverfassungsgericht*).

It is not only the problem of the compatibility of the state under the rule of law and the social state which poses large difficulties to its solution but also the problem of the compatibility of the interests of various economic groups. There are not only the often contrary interests of the employers and the employees but also the often different and opposite interests of various groups of enterprises, as *e.g.*, in the area of transportation of persons and goods between the railways, shipping lines or motor vehicle carriers. All these various and often opposing interests must be accorded with the general interest or the general welfare. A fundamental principle of the social state is the solution of the problem of the compatibility of the interests of employers and employees. Consideration must also be given to the compatibility of those interests with other group interests and with the general interest. But it is important to see that the concept of the social state is not the same as the concept of a socialistic state although the ideas and views of socialism have had great influence on the development of the problems of the social state. The modern social state is not to be confounded with the earlier welfare state (*Wohlfahrtsstaat*) of the era of absolutism. The absolute welfare state was characterized by the regiment of the monarch who decided the content of what was to be done on behalf of the general welfare. Today it is the democratic parliament which decides the aforesaid problems and the means for the realization of them.

II

The liberal state under the rule of law is embodied in the constitutions, above all, in the basic rights and especially in the guarantees of a free development of personality and free choice and practice of occupation as well as in the guarantee of freedom of property. Freedom of property will be discussed later. It is well known that legislation in the United States had brought essential restraints for various activities in the areas of commerce, production and transportation, essentially founded upon the commerce-clause (art. 1, sec. 8, cl. 3). For comparative law it may be of interest to demonstrate current conceptions in the Federal Republic of Germany containing general standards giving answer to the question of the reasonableness of such restraints.

The right of free development of personality is of importance in the area of the economy especially with reference to the choice and

practice of economic occupations and professions. In both respects the German Basic Law contains fundamental regulations, contriving an interpretation according to the spirit of greater economic freedom, perhaps to a larger extent than is possible by virtue of the Constitution of the United States. This is possible because the German regulations allow less room for an interpretation by the judge, than do the very general regulations of the Constitution of the United States.

In the Constitution of the German Federal Republic the regulation of art. 2, par. 1 is of fundamental importance:

> Everyone has the right to the free development of his personality insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code.

Of the same importance is the special regulation of art. 12, par. 1 of the Basic Law:

> All Germans shall have the right freely to choose their occupation, place of work and place of training. The practice of an occupation may be regulated by legislation.

For the interpretation of all regulations concerning basic rights the rule of art. 19, par. 2 must be taken into consideration:

> In no case may a basic right be affected in its basic content.

The task of interpreting the basic content of a basic right often poses very difficult problems for judicial control of legislation.

Every economic system laying claim to the name of liberal must guarantee the freedom of industrial leadership. Every economic system putting aside the freedom of industrial leadership (*freies Unternehmertum*) is not compatible with a liberal economic system, as E. R. Huber[3] clearly demonstrates. For the same reason an economic system which permits private economic leadership in merely the formal sense, while in all other respects exactly directs all conditions of production cannot be called a free economic system. Therefore art. 2, par. 1 of the German Basic Law is as Maunz-Durig[4] notes, really a Magna Charta against all economic systems of a socialistic state (*Staatssozialismus*) or of a state commanding alone all economic conditions (*staatliche Kommandowirtschaft*).

Already these observations may demonstrate that even such norms of a constitution, which though not directly relating to economic conditions, may nevertheless have many consequences in the area of economic conditions. Such standards provide remarkable limitations against many regulations of economic questions by the state. Quite

[3] Der Streit um das Wirtschaftsverfassungsrecht, in: Die öffentliche Verwaltung (DOeV) 135 (1956).

[4] Maunz-Dürig, Grundgesetz, Kommentar, Nr. 46 to art. 2, par. 1 (1959).

reasonably, the German Federal Constitutional Court in a judgment of July 20, 1954[5] has pronounced that the Basic Law guarantees neither an economic neutrality of the executive and legislative power nor a social market-economy (*soziale Marktwirtschaft*) regulated only by means that are in accordance with the economic system of a free market. An economic neutrality of the Basic Law is in the opinion of the court only existent insofar as the Basic Law has not adopted special economic provisions.

These observations of the Constitutional Court can be consented to only with the reservation that some important basic rights place very remarkable limitations upon regulations of economic conditions by the state. Further it must be taken into consideration that the principle of the social state is giving to the state a positive task, from which on the one hand duties, and on the other hand limitations, of the activity of the state are to be derived. It is quite right when Bachof[6] declares that the basic rights must be seen and interpreted under the declaration of the Federal Republic of Germany as a social state and that this declaration contains an authorization and at the same time a mandate on the state to realize a social system directed at realizing and preserving social justice and affording relief of social need by help of the state. In the same way has Ipsen[7] earlier demonstrated that the formula of the social state is not a mere concept without real content but a destination for the activity of the state.

Thus, it may be taken for granted that it is impossible to infer from the Basic Law an unwritten law of an economic neutrality, as Ballerstedt in a remarkable essay on the constitution of the economy (*Wirtschaftsverfassungsrecht*)[8] very clearly emphasizes.

In connection with the problem of standards for the regulation of business by the state the aforesaid observations, including the example of the basic right of free development of personality as defined by art. 2, par. 1 of the Basic Law and the principle of the social state, might suggest that the constitution contains general principles often standing in opposition to one another. Such a contrast certainly exists between the demands resulting from the basic right of free development of personality in connection with the principles of the liberal state under the rule of law on the one hand, and the demands resulting from the principle of social states (*Sozialstaatsprinzip*) on the other. Forsthoff[9] correctly noted that the state under the rule of law and the

[5] Entscheidungen des Bundesverfassungsgerichts (=BVerfGE), vol. 4, p. 97, 17.

[6] Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (=VVDStL), vol. 12, p. 37, 80 (1954).

[7] VVDStL vol. 10, p. 74 (1952).

[8] In: Bettermann-Nipperdey-Scheuner, Die Grundrechte, vol. III/1, p. 1 (1958).

[9] Begriff und Wesen des sozialen Rechtsstaates, VVDStL vol. 12, p. 8, 19 (1954).

social state are in reference to their intentions very different and almost antitheses, as the state under the rule of law aims at freedom while the realization of a social state brings necessarily encroachments upon freedom and property. Nevertheless, the state under the rule of law and the social state do not exclude each other, for they must complement themselves. The state under the rule of law must not be abused as a refuge of the *beati possidentes* or it misses its social mandate and endangers itself. A radical realization of the social state leads to an executive state (*Verwaltungsstaat*) which cannot be a state under the rule of law, as Forsthoff demonstrates.[10]

For the law of the German Federal Republic, that contrast may be especially clear, because the Basic Law itself speaks of the state under the rule of law and of the social state. But also under other constitutions, which do not contain such formulas, the same problems arise, as the situation in the United States illustrates. The clause of the social state may often be superseded by the task and competence of the Congress "to provide for the . . . general welfare of the United States" (art. I, sec. 8, cl. 1). On principle it must be agreed that the welfare clause and the tax clause of art. I, sec. 8, cl. 1 are closely related; their development (*e.g.*, the jurisdiction in the New Deal cases) resulted in heavy encroachments on economic conditions.[11]

The concept of the social state as well as the concept of general welfare contain very difficult problems of interpretation, but perhaps the concept of the social state may be clearer as it refers to an equitable and just distribution of goods and income. It is not appropriate here to discuss the concept of general welfare in all its detail,[12] but it can be said that it is nearly impossible to give an exact definition of that concept. The meaning of that concept must be understood and interpreted in the light of the special conditions in a state at an appointed time. But it may be, no doubt, that today even in the United States the concept of the general or public welfare can not be understood without taking into consideration elements of the principle of the social state. Today the protection and help for economically weaker persons is nearly everywhere an object of the activity of the state within the scope of promoting the general welfare. And even in other states we see similar contrasts between the liberal state under the rule of law and the modern welfare state or the modern social state, as it is much discussed in the German Federal Republic with regard to the text of the Basic Law.

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10 *Ibid.*

11 *Cf.* Loewenstein, *supra* note 1 at 119.

12 *Cf.* the very interesting essay by V. Bolgar, "The Concept of Public Welfare," 8 Am. J. Comp. L. 44 (1959).

The character of the state under the rule of law is setting bounds to the demands of the social state and to the extension of encroachments on freedom—free development of personality and property. Such encroachments must, as Maunz-Durig[13] demonstrates, be equal and proportionate, that is, they must not injure an individual as a bearer of basic rights more than is necessary in view of the object aspired to by the state. In the same way it satisfies the requirements of the state under the rule of law that the encroachments of the state are ascertainable and that the individual must not be at the mercy of the state. The consequences arising from the state under the rule of law are therefore especially important with reference to the contents and the form of encroachments on the economic conditions by the state. Further there must be a sufficient protection of the affected individual by the courts.

The above mentioned basic right, freely to choose and to practice every kind of occupation, as embodied in art. 12, par. 1 of the Basic Law is involved in the basic right of free development of personality. It may be of interest that the basic right to freely choose and practice every occupation has succeeded in the German Federal Republic essentially upon the influence of measures of the American occupation power.[14]

The fundamental interpretation of the basic right of art. 12, par. 1 of the Basic Law finds itself in the judgment of the Federal Constitutional Court of June 6, 1958.[15] This judgment has nullified a provision of a Bavarian law (art. 3, par. 1) relating to apothecary's shops according to which the license for the establishment of a new apothecary's shop is only to be given when the establishment of the new shop is in the public interest for supplying the people with medicines. It must also be established that the economic basis of the new shop is guaranteed and that the economic basis of neighboring apothecary shops will not be weakened to such an extent that their continued existence is no longer assured. The legal provision that emanated from the opinion was that the establishment of new shops is only in the public interest when their capacity is guaranteed and when the existence of the neighboring shops is not endangered. The principle of liberty of trade has not succeeded for the apothecary shops. But the Federal Constitutional Court did not follow those considerations and nullified the aforesaid legal provision because of its contradiction to art. 12, par. 1 of the Basic Law.

It is important to see how the court tried to interpret the meaning

[13] *Supra* note 4, nr. 63-65, to art. 2, par. 1.

[14] *Cf.* Bachof, "Freiheit des Berufs, in: Die Grundrechte," vol. III/1, p. 155, 159.

[15] BVerfGE 7, 377.

and the extension of the authorization of the legislative power while regulating the practice of an occupation in a way satisfying the requirements of the whole legal meaning of that basic right as well as the requirements set by its importance in the social life. The court maintained the view that the aforesaid authorization is given with intent to regulate the practice of an occupation so that under this point of view it shall be possible to regulate even the choice of an occupation. Upon the basis of that view, the court developed the following principles which can be considered as very remarkable standards for regulations of business by the state and especially for the regulation of the choice and the practice of an occupation:

> The basic right (se. of art. 12, par. 1) shall protect the freedom of the individual, the regulation-clause shall guarantee a sufficient protection of the general interest. From the necessity to do justice to both requirements follows for the encroachments of the legislative power the order to differentiate perhaps according to the following principles:
>
> (a) The free practice of an occupation can be restricted inasmuch as it seems to be reasonable on account of the general welfare. The protection of the basic right is restricted on the defense of unconstitutional encroachments especially charging excessively and requiring too much of a person.
>
> (b) The free choice of an occupation must not be restricted more than the protection of especially important goods of the community it demands imperatively. When such an encroachment is inevitable, it is necessary to choose that form of encroachment which restricts the basic right as little as possible.
>
> (c) When it is encroached upon the free choice of occupation by establishing certain conditions for the choice of occupation, it must be distinguished between subjective and objective conditions; for the subjective conditions (especially the training) must be recognized the rule of proportion with the meaning that they must not be out of proportion to the intended purpose of a due practice of the occupation. Very strict requests are to be made to the evidence of the necessity of objective conditions for the beginning of an occupation; generally only the defense of heavy dangers for goods of community (Gemeinschaftsguter) of eminent importance may justify such measures.
>
> (d) Regulations under art. 12, par. 1, sentence 1, must always be made on that step which brings the smallest encroachment upon the free choice of occupation; the next step is to be entered by the legislator not till when it is proved with utmost probability that the feared danger can not be opposed with (constitutional) means of the previous step.
>
> The Federal Constitutional Court has to examine if the legislator has regarded the limitations ensuing from the aforesaid observations; when the free choice of occupation is restricted by objective conditions for the beginning of occupation it must be examined too, whether just that condition is inevitable with regard to an eminent good of community.

By virtue of those considerations the court nullified the aforesaid legal provision of the Bavarian law relating to apothecary shops and stated that in this area only the freedom of settlement defined as the absence of objective conditions of admission meets the constitutional requirement.

The practical difficulty lies, as the court demonstrates, in that there must be combined the substantially free discretion of the legislator in the area of economic and social policy and of policy relating to the regulation of occupations with the protection of freedom guaranteed to the individual even against the legislator:

> The right of freedom of the individual is so much effective the more his right to choose freely his occupation comes into question; the protection of the general interest is so much effective the more detriments and dangers are heavy which can arise from an entirely free practice of occupation. When it is tried to do justice to both—in a social state under the rule of law equally legitimate —demands, the solution can only be found from time to time by way of a careful levelling of the importance of the opposite and perhaps quite contrary interests. When it is held on that by virtue of the principles of the Basic Law the free human personality is the highest value . . . , follows that this freedom is to be limited only in so far as it is inevitable with regard to the general interest.[16]

This judgment of the German Federal Constitutional Court shows clearly the difficult problems of all governmental regulations of business. Scheuner[17] has demonstrated that a system of limited governmental regulations of economic conditions is combinable with the principles of a democratic constitution and with the legal system under the rule of law. The essential condition for it must be, as he states, a real limitation and an effective protection of the rudiments of personal and economic freedom and of the principles of the state under the rule of law.

III

With regard to governmental interventions in the area of business, the standards and the limits ensuing from the basic right of *equality before the law* are of great importance. It may be noted that the advance of that principle in its historic development has brought first the recognition of a merely formal equality and only after a rather long time and under the influence of socialist ideas is a more and more material equality achieved. The first step in achieving such aspirations is to secure human existence and consequently the possibility of free development of personality. Thus the principle of

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[16] *Id.* at 404.

[17] VVDStL 11, p. 1, 68.

equality before the law gains great importance within the modern welfare state or within the modern social state.

The question of the observance of equality before the law also gains significance when the state promotes individual economic groups by measures regulating economic conditions. The German Federal Constitutional Court has examined that question with regard to the question of the constitutionality of the *"Investitionshilfegesetz"* (law relating to help of investment) of January 7, 1952. By virtue of that law the industrial undertakings had to raise an amount of one milliard of German Marks (DM) to cover the urgent demands for investment-capital by the coal-mines, the ironworks and the power plants. The law was challenged as violating the principle of equality before the law. The court stated in its judgment of July 20, 1954,[18] that law regulating economic conditions is not unconstitutional for the reason that it changes the conditions of competitive trade. Such laws can be enacted, in the court's opinion, in the interest of individual groups, but only when it is demanded by the general interest, and other interests requiring protection are not neglected. The court demonstrates that every governmental measure regulating economic conditions is an interference with free economic gambling and the resulting situation of competitive trade. When such governmental measures are once constitutionally admissible, they cannot, in the court's opinion, become inadmissible merely because they change the situation of competitive trade; they would be inadmissible only when they should justify the conclusion that the law had been enacted by a legislator exceeding his discretionary power.

For a comparison with similar questions raised by the laws of the United States, it is of interest that with the law relating to the *"Investitionshilfe"* the legislator had adopted measures to promote the general interest in favor of important industry. This law simultaneously brought about an important financial change in other industrial undertakings because they had to raise the financial means for investment. The Constitutional Court had refused, it is true, to consider the financial charges of the industrial undertakings as taxes, as defined in the constitution, but it has comparatively referred to charges by taxes so that we can see a connection between taxes and the promotion of the general welfare. Such a connection finds itself in the tax power and the power to provide for the general welfare, as embodied in art. 1, sec. 8, cl. 1 of the Constitution of the United States. The Court entertained the view that industrial undertakings have long been recognized as a special object of taxes and duties so that in this jurisdiction even special taxes of single groups of occupations and

[18] BVerfGE 4, 7.

branches of industry had been considered as compatible with the principle of equality before the law, inasmuch as it can be justified by the individuality of the circumstances. For those reasons the Court considered the law relating to the investment help (*Investitionshilfegesetz*) as constitutional and not exceeding the discretionary power of the legislator.

This example of the jurisdiction of the German Federal Constitutional Court may show clearly the justness of the statement of Scheuner,[19] that the principle of equality before the law is most important for governmental measures regulating economic conditions, because only from that principle can aid and direction be taken against a deficient allocation of goods, inequitable compensation, or unequal distribution of charges. That is the case especially with regard to regulations in favor of or against certain economic groups. Whether and how far the legislator profits by a constitutional competence is left to his discretion within the framework of the constitution, and judicial control has only the competence to examine whether the legislator had exceeded the utmost bounds of his discretionary power. That must be recognized especially for governmental measures regulating economic and market conditions.

Whether the principle of equality before the law is violated can, as Ipsen[20] states, only be judged by the case under consideration and by the purpose of the law under consideration. The principle of equality can be violated by a positive provision of a law or by an omission of the legislator.

Those questions may be raised then even when the legislator adopts measures which give decisive significance to the location of individual undertakings or of a group of them. For the case of the provision of power plants in Northern Germany with coal, Ipsen has stated[21] that the boards regulating economic conditions could order the import and the purchase of more expensive (and with regard to quality, less appropriate) English coal when the high duties to export German coal do not guarantee a sufficient supply for the German consumer of the Ruhr-coal. As Ipsen demonstrates, it is a violation of equality before the law when such an order is only imposed on a single group of consumers near the coast while on the other hand other groups of consumers in the same area can obtain Ruhr-coal. The principle of equality before the law required the same treatment of all groups of consumers with the same location near the coast.

Equality before the law demands that on principle also, prices be

19 VVDStL vol. 11, p. 56, 73 (1954).

20 Gleichheit, in: Die Grundrechte, vol. 11, p. 189 (1954).

21 *Ibid.*

levied in equal shares, as Ipsen demonstrates[22] when he says that the significance of a principle of compensation for a violation of equality before the law is growing in a system of intervention into economic conditions by the legislative and executive power. Here can, and must, the principle of equality positively demand equality of the distribution of charges; that principle can be the basis of claims for compensation and reparation, when governmental regulations contrary to the principle have created inequalities in the distribution of charges. For some time it was not admissible that one group of industrial undertakings was discriminated against to the advantage of one or more other groups and perhaps endangered in its existence, as Scheuner deduces it from the principle of equality before the law.[23]

Summing up, it can be stated that a governmental regulation exceeding the charges of undertakings possible even under a critical examination, though justified from the point of view of general economic and social considerations, offends the principle of equality before the law, and endangers the existence of the undertakings.

In connection with measures regulating economic conditions it is permissible to adopt measures establishing prices, save that such regulations could be always considered as violating the equality before the law. So the German Federal Constitutional Court has stated in a judgment of November 12, 1958,[24] that the provisions of the law relating to prices (§2) authorizing the federal minister of economics (*Bundeswirtschaftsminister*) and the highest authorities of the Laender (member-states) to issue decrees fixing the prices, rents, duties and other payments for goods, production, or services (except wages), or to issue decrees holding up the present situation of prices do not conflict with the principle of equality before the law. Of course, such measures must not exceed the discretionary power of the legislative or executive power; they must obey the demands resulting from the principle of equality before the law and they must be issued in the general interest.

As mentioned above in connection with the investment-help judgment of the Constitutional Court, equality before the law may be of essential significance in connection with economic regulations and taxes. In a very interesting judgment concerning the collective taxation of marital partners, the court nullified the legal provisions on that subject (judgment of January 1, 1957)[25] and considered it as unconstitutional when the wife has not the possibility of earning the same

22 *Id.* at 195.

23 VVDStL, vol. 11, p. 65 (1953).

24 BVerfGE 8, p. 274.

25 BVerfGE E 6, p. 55.

income as the man under equal economic conditions. From that statement it follows that laws relating to the beginning and the practice of occupations and the earning of incomes of economic activities must not discriminate against women because such a measure would be contrary to equality before the law.

In the sphere of economic regulations of the state, the principle of equality before the law has the general significance already noted in an early judgment of the Constitutional Court of October 23, 1951:[26]

> The principle of equality before the law is violated, when there is no reasonable motive flowing from the nature of things or otherwise evident for the legal distinction or nondistinction, in short, when the legal provision must be considered as exceeding the discretionary power or as despotic.

Equality before the law is of great importance in connection with the protection of property, but that problem will be discussed in the following section.

IV

In connection with governmental regulations relating to economic conditions, the protection of *property* is always an important part, especially when it is the question whether a legal regulation can be considered as a constitutional limitation of the property or whether it is an expropriation. This question is, in the German legal system, of essential importance, as art. 14, par. 1 of the Basic Law contains the following provisions: "Property and the right of inheritance shall be guaranteed. The contents and limitations shall be determined by legislation." These provisions are completed by the following provisions having an especially great importance in respect to the principle of the social state: "Property shall involve obligations. Its use shall simultaneously serve the general welfare."

The authorization of legislation to determine the contents of property must be understood and interpreted in connection with the provision of art. 19, par. 2 of the Basic Law according to which in no case may a basic right be affected in its fundamental content. From that provision it follows that notwithstanding the authorization of the legislator to determine the contents and the limitations of the property, this right may not be completely hollowed out. But it may be agreed that the duty of the proprietor to use the property in a way which simultaneously serves the general welfare admits limitations of the property in the interest of the general welfare, and for the realization of the principle of the welfare state on a larger scale than would

[26] BVerfGE 1, p. 14.

be considered admissible under a merely liberal legal and economic system.

Ipsen,[27] in a report about expropriation and socialization, has emphasized that the Basic Law with its decision for the social state has provided a basis for deepening and proclaiming abroad this decision according to the spirit of the Basic Law by an adequate shaping of the social conditions. Ipsen states correctly that the concept of property and of its meaning is subjected to a change of that meaning, and that it is impossible to adopt the meaning of the concept of the property according to the Constitution of Weimar of August 11, 1919. He demonstrates that between the times of the Constitution of Weimar and the Basic Law of 1949 lies a development which cannot be denied. One which has led from its beginnings in the legislation during the first world war relating to the planning and governing of economic conditions to obligations of the rights of the proprietor by the public law, into an economic system directed by the state in various forms. The concept and the function of property must today be seen from the vantage point of the experience of a generation which witnessed an extraordinary extension of the state's influence over economic conditions. As Ipsen states, the end of the second world war has not brought the automatic end of all the controls of the state on the economic sphere, and neither the state nor the individual can relinquish the experiences of the governmental regulation of economic conditions. They belong today—and not only in the German Federal Republic—on principle to the contents of admissible legal dispositions on property: "Property is today more open to governmental regulations than it was in 1919. When art. 14 of the Basic Law guarantees property, then it is *this* property and not the property of a legal system which did not know a governmental regulation and control of the economic conditions at all or at least regulations and controls of such a kind."[28] From these observations, Ipsen draws the consequences that from the fact that the present economic system of the social market-economy (*soziale Marktwirtschaft*) wants to restrict itself to a minimum of economic regulations by the state, the conclusion must not be reached that far-reaching regulations and limitations of property should be unconstitutional with regard to the guarantee of the property in art. 14 of the Basic Law, nor that such regulations and limitations could only be made in the form of expropriation and in return of compensation.

Opposed to this view, others demonstrate that even today by no means all governmental encroachments upon the property are ad-

[27] VVDStL, vol. 10, p. 74 (1952).

[28] Ipsen, *supra* note 7 at 83.

missible. Reinhardt[29] emphasizes in connection with art. 14 of the Basic Law, particularly the aforesaid obligation derived from art. 19, par. 2 of the Basic Law, not to affect a basic right in its basic content. He states that the public authority is obliged to serve moderation in proportion to private initiative on the one hand and public initiative on the other hand: "Under the rule of the systems of private property the public authority is inhibited to solve the problems of the social life simply by an all directing system. It is much more obliged to find out every conceivable way in which the desired compensation may be reached by putting into action the self-responsible and industrious decisions of the individuals."

From those general conceptions it does not follow that, therefore, governmental regulations and other encroachments on the economic conditions should be generally excluded. Reinhardt states[30] that the introduction of economic controls or distribution of goods according to present conditions was founded upon the fact that because of an extraordinary situation the market had fallen into a crisis and as a result the provision of the people was endangered. Theoretically it would be possible that the state assumes the responsibility for the whole provision of the community. But according to the principles of the constitution, it is only permissible to restrict the private initiative of the employer to such an extent as it is necessary to prevent exorbitant profits being drawn out of an abnormal situation while assuring the equal provision of the consumers. Reinhardt demonstrates how the large obligations of the proprietor illustrate the meaning of the social obligation of property arising out of a crisis and how that obligation is fulfilled (according to the principle of the private utility [*prinzip der Privatnutzigkeit*]) by striving for a just compensation of all interests.

In connection with the question of the constitutionality of restraints of viticulture, the German Federal Constitutional Court has stated in a judgment of July 10, 1958,[31] that the legislation fixing limitations on the rights of the proprietor is not entirely free from question. The motive of such limitations must be legitimated on the basis of the general interest. Restraints of viticulture may only be considered as constitutional, when and as far as the public interest can justify them from the point of view of the public interest and subject to the principle of proportionateness. But the court points out that the social responsibilities and obligations of the proprietor provide a relatively wide range for the discretion of the legislator. The

29 Reinhardt-Scheuner, Verfassungsschutz des Eigentums, p. 26 (1954).

30 *Id.* at 34 f.

31 BVerfGE 7, p. 71.

court considers as admissible points of view in the light of such criteria the securing of nourishment, ameliorating viticulture, or the protection of the wine producer when a social crisis is threatening and the interests of other groups are not unequally neglected.

Economic freedom and the freedom of property are essentially encroached on in the sphere of the building concerns. Here the question often arises to what extent the legislator is authorized to impose restrictions upon the erection of buildings by virtue of the social obligations of the proprietor when an expropriation is in question which creates a right of compensation. *E.g.*, the Federal Court (*Bundesgerichtshof*) in a judgment of November 26, 1954,[32] has stated that an interdiction to build, that is a transitory interdiction to build, is on principle to be considered as a social obligation of the proprietor not creating a right of compensation when it serves the securing of the realization of covering a ground with buildings (Bebauungsplan) in the interest of the possibility to erect buildings on that ground. That is especially the case when such an interdiction to build deals with large areas in towns which were destroyed in the last war. An interdiction to build which serves only the execution of a general plan of covering grounds with buildings in a town, or for a larger area only in the general interest, demands, in the court's opinion, a special sacrifice of the affected proprietors in the general interest and is to be compared with an expropriation. The attempt to distinguish situations on the basis of the purpose of such interdictions is unsatisfactory because in general more and various purposes are involved. Therefore, preference is to be given to the opinion of the Federal Administrative Court (Bundesverwaltungsgericht) in the judgment of October 25, 1956,[33] where the legal character of such interdictions is judged by the space of time of the interdiction: a long enduring interdiction is comparable to an expropriation and gives a remedy in damages. How the time for such an interdiction is to be limited cannot be established with a general validity, but that question is submitted as a legal issue for decision.

In relation to the building concerns it may further be mentioned that the German Federal Court (*Bundesgerichtshof*) in a judgment of June 10, 1952,[34] has stated that the housing control which has been continued since the end of war because of the great lack of dwellings, and the price-supervision relating to dwellings, are both justified as social obligations of the proprietor of a house, and that those measures cannot be considered as expropriations giving a remedy in damages.

[32] Entscheidungen des Bundesgerichtshofs in Zivilsachen (= BGHZ), vol. 15, p. 268.

[33] Entscheidungen des Bundesverwaltungsgerichts (= BVerwGE), vol. 4, p. 120.

[34] BGHZ, vol. 6, p. 270.

This example may show very clearly that it is nearly impossible to give general standards for judging the reasonableness of governmental economic regulations, because with the increase of available dwellings the necessity of housing control may no longer be justified. There may come a point of time at which such governmental regulations can no longer be justified on the basis of the social obligation of the proprietor of a house.

V

That various kinds of associations are seeking to establish their influence in the formulation of economic conditions is of great importance. Therefore the *right to form associations* is of very great significance. Art. 9, par. 3 of the Basic Law guarantees that freedom: "The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to everyone and to all professions. Agreements which seek to restrict or hinder this right shall be null and void; measures directed to this end shall be illegal."

The German Federal Constitutional Court has pointed out the meaning of that basic right, especially in the judgment of November 18, 1954,[35] and the court has stated that the basic right to form associations deals not only with the association itself, but also with the association toward the end of actively safeguarding and improving the interests of employers and of employees. As the court states, that means that freely formed associations can exercise influence on the setting of wages and other conditions of labor and may come to collective agreements (*Kollektivvertrage*). The historical development has led to the point that such agreements are made in the legal form of collective agreements with an authoritative character and the contents of such agreements must not be changed by individual contracts. From the point of view of its historical development, the meaning of the basic right freely to form such associations as it is now guaranteed in art. 9, par. 3 of the Basic Law must be interpreted in such a way that the present legal system permits the possibility of collective agreements and assured that the parties to such agreements are voluntary members of freely formed associations.

The case under consideration dealt with the question whether every freely formed association is, because of the Basic Law, legitimated as a party to a collective agreement. The problem was whether the legislator is obliged to consider every association of this nature as party to a collective agreement or whether he can refuse it without violating the basic right freely to form such associations. Quite properly, the court stated that it is the purpose of that right to protect such

[35] BVerfGE, vol. 4, p. 96.

associations which in view of their organization are independent enough to plead effectively the interests of its members in the sphere of labor law and in the social field. In any case the legislator must not check the free development of the associations inappropriately. Therefore, he must not inhibit free decision relating to the organic form of the association. But he is not obliged in every case to admit such unusual organic forms which are lacking in regard to effective development.

From the historical development it may also be learned that the "working and economic conditions" as they are mentioned in art. 9, par. 3 of the Basic Law are only those conditions which play a part between employers and employees in similar situations and which are protected by the associations of the one group against the other, as is demonstrated by Dietz.[36] But that opinion is not uncontradicted. Frequently, art. 9, par. 3 is interpreted in the sense that this basic right also guarantees the freedom to form other associations in the sphere of economic life. Maunz[37] entertains the opinion that the freedom freely to form associations also embraces the right freely to form associations of employers with the purpose of restraining free competition, that is, cartels. He points out that the right freely to form associations in the sphere of labor law as was already guaranteed by the constitution of Weimar of August 11, 1919, has been extended to a general right to form associations in the sphere of economic conditions. But that does not mean that all state restraint or control over agreements of employers proposing to restrain free competition or to regulate the market shall be excluded. That is implied from art. 9, par. 2 of the Basic Law which restrains the general freedom of association. Art. 9, par. 3 provides that associations that are in contravention of the criminal law, or which are directed against the constitutional order or the concept of international understanding, shall be prohibited. Under the constitutional order falls also the principle of the social state from which restraints of the forming and of the activity of cartels may arise.

The law against restraints of free competition of July 27, 1957 (Cartel-Law, *Kartellgesetz*) states (§1) that contracts of employers or of associations of employers with a common purpose and decisions of associations of employers are void as far as they attempt to influence production or the market conditions of the trade of goods or industrial products by restraints of free competition. That is not applicable to contracts and agreements bearing upon the equal application of general terms of business, sale conditions and terms of pay-

[36] Die Koalitionsfreiheit, in: Die Grundrechte, vol. III/1, p. 417.

[37] Deutsches Staatsrecht 126 (9th ed. 1959).

ment. In addition, some exemptions are provided from the general interdiction against cartels mentioned in section 1 of the aforesaid law. Particularly, there is an exemption provided for price-cartels when a restraint of free competition has become necessary from the point of view of outweighing interests of general economic conditions or general welfare.

Supposing for the moment that the right freely to form associations, as mentioned in art. 9, par. 3 of the Basic Law, also permits the freedom of forming cartels, it is doubtful, as Maunz[38] points out, whether the regulations of the Cartel-Law providing a general interdiction of cartels are constitutional and not contrary to art. 9, par. 3.

It is generally assumed that the basic rights guarantee not only a positive freedom of association or coalition, that is the right freely to form associations, but also a negative freedom, that is the right to be free of an association.

VI

Within a brief essay it was only possible to point out a few examples in which the question of standards for governmental regulation of business or of economic conditions act a part. I have tried to give examples from the highest courts of the German Federal Republic, particularly the Federal Constitutional Court, which may have their parallels in the jurisdiction of the United States Supreme Court.

When standards or principles of governmental regulations of business are discussed, one may first think of positive standards which shall indicate what the state must do, and not what it must refrain from doing. But positive standards for the activity of the state relating to economic conditions find themselves in the constitutions only in a limited extent. It remains generally for the discretionary power of the legislator and of the government to decide what kind of economic system shall be realized, and only from the provisions which place limits on the activity of the state do we derive direct restraints of that activity. Indirectly, we find certain positive directions or standards as far as such restraints contain interdictions for the realization of other economic systems. From the point of view of those considerations it must be understood why the economic system under the Basic Law is denominated as a system of "economic neutrality." That neutrality means only that the constitution has not decided explicitly in favor of a certain economic system. Therefore the legislator and the government are empowered to pursue at any given time the economic policy which seems to be useful, as long as the conditions of the Basic Law are observed. The present economic and social system is truly a

[38] *Ibid.*

system made possible by virtue of the Basic Law, but as the Constitutional Court states, by no means the only possible system. It is due to a decision of the legislator which can be replaced or pierced by another decision.[39]

The statement of the Constitutional Court in the aforesaid judgment, that the legislator may pursue every economic policy "as far as the conditions of the Basic Law are kept," possesses a decisive significance. The examples cited have shown that from the basic rights come remarkable standards for the economic and social policy of the state which do far more than establish limits upon that policy. Above all, the principle of the social state contains a standard with an eminently positive character, for it excludes a merely liberal economic policy as defined by the sentence "laissez faire, laissez passer." To be sure it may be difficult to state more or less exactly the contents of that principle. But it may be said, according to Maunz,[40] that on the basis of that principle the state shall be constructed pursuant to the principles of social justice. This means that every group or class of the people shall have its due and that for everybody the possibility of sufficient development of their economic and cultural existence is guaranteed. Within the scope of that consideration Maunz defines the social state as a state which refuses and opposes economic or cultural suppression or the discrimination of a class or a group of the people and which tries to remedy such suppressions or discriminations.

The essential problem for the legislator and the government is the great difficulty in finding just compromises between the demands of the principles of the social state, the demands of the general welfare, and the demands of the state under the rule of law. The consequences arising from the basic rights are inseparably linked with the state under the rule of law. The standards of business regulation by the state must be founded upon a just compromise of those principles and the demands arising from the basic rights.

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[39] Judgment of the Federal Constitutional Court of July 20, BVerfGE, vol. 4, p. 17 (1954).

[40] *Id.* at 60.